BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBBIE OLIVE Claimant VS. **FIBERGLASS ENGINEERING, INC.** Respondent AND **U.S.F. & G.** Insurance Carrier	)	Docket No. 183,195

ORDER

The respondent and its insurance carrier request review of the Award entered by Administrative Law Judge Shannon S. Krysl on November 8, 1994.

APPEARANCES

Claimant appeared by her attorney, Charles W. Hess of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, M. Doug Bell of Coffeyville, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board as well as the stipulations of the parties are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a seventy-four percent (74%) work disability. The respondent requested this review and asks the Appeals Board to review the issues of:

(1) Whether claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent; and

(2) What is the nature and extent of claimant's disability?

The claimant has requested the Appeals Board to review the issues of:

(3) What is the appropriate date of accident;

(4) Whether the Administrative Law Judge awarded the correct number of weeks of temporary total disability benefits; and

(5) Whether the Administrative Law Judge has the authority to order the claimant to notify her attorney and the Administrative Law Judge within two weeks of either finding employment or beginning to earn wages.

Those five issues are now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons below, the Award of the Administrative Law Judge should be modified.

(1)(3) Claimant worked for the respondent, a boat manufacturer, from March 1985 through August 11, 1993. The alleged period of accident is October 1992 through her last day of work for the respondent on August 11, 1993, the period when claimant worked as a customer service technician and repaired fiberglass boats. Claimant's job required her to climb in, under and around boats to make repair estimates and the actual repairs. Claimant worked in awkward positions and was required to repetitively bend, stoop, kneel and squat. Claimant testified that during the period of the alleged accident she spent fifty to seventy-five percent (50-75%) of her workdays sitting on hard surfaces while performing her job.

On October 29, 1992, claimant consulted Frank A. Moorhead, Jr., M.D., her family physician and one of respondent's company doctors, complaining of low back pain, menstrual cramps and irritability. Claimant continued to treat with Dr. Moorhead from October 1992 through August 1993 believing her problems were gynecological. Claimant testified that from July 1, 1993 through her last day of work on August 11, 1993, the busy season for boat repair, her back pain progressively worsened to the point it was difficult to straighten her back or tie her shoes. On August 11, 1993, Dr. Moorhead examined claimant and found she was having severe muscle spasms in her low back and telephoned the respondent to report that claimant was in severe pain and needed time off work. Dr. Moorhead diagnosed chronic lumbosacral strain and coccydynia and began treatment for those conditions.

Because respondent was not satisfied with Dr. Moorhead's treatment, the company referred claimant to William D. Smith, M.D., an orthopedist in Bartlesville, Oklahoma. After a short period of conservative treatment, Dr. Smith removed claimant's coccyx.

After recuperating from surgery, claimant returned to work for respondent on May 16, 1994. Although she had been notified respondent had a job available for her within her permanent restrictions in the customer service department, respondent gave claimant a job sewing in the upholstery department despite her lack of experience and

training in that position. The sewing job required claimant to bend forward for extended periods in order to closely watch the seams she was sewing. After attempting to do the job for two days, claimant advised respondent she was physically unable to continue because of increased pain in her back. Respondent's human resource manager then advised claimant the company did not have a position for her if she could not perform that job.

After she left work on May 17 and had been advised respondent had no job for her, claimant and her husband decided to move to Oklahoma where her husband could obtain work through a relative that provided health insurance benefits. Claimant's husband notified his then-present employer of his resignation and placed their home for sale. As of the date of the regular hearing, claimant was not working or earning any wages.

Claimant presented the testimony of Dr. Moorhead who testified claimant sustained a chronic repetitive injury to her coccyx. As one of respondent's company doctors, he is familiar with many of the jobs in respondent's plant and has toured the plant on numerous occasions. On page 49 of his deposition, Dr. Moorhead stated:

> "Q Okay. So there's no question in your mind, and your testimony today is that her coccyx problems arose out of direct injury occurring through her work at Fiberglass Engineering, Inc.
> "A It resulted from her working on the little scooter, yes, which in turn was part of her job at Fiberglass Engineering.
> "Q And it's also your opinion that her ligamentous strain was as a result of her work activities at Fiberglass Engineering.
> "A Chronic repetitive action in the manner in which she had to perform her activities."

Dr. Moorhead also indicated that he is familiar with the sewing position claimant attempted to perform in May 1994 and that she is unable to perform that job because of the leaning and bending that it requires.

The parties stipulated that certain letters and reports of Ely Bartal, M.D., were to be admitted into evidence. Dr. Bartal saw claimant in October 1993 when she was referred by Dr. Moorhead for a second opinion. His records indicate he believes claimant should observe the following permanent work restrictions and limitations: no sitting longer than one hour at a time; she should be permitted to walk or stand ten (10) to fifteen (15) minutes after each hour; she should have a special seating cushion; there should be limited repetitive bending, stooping and leaning of no more than ten (10) times per hour. The doctor believes claimant has sustained a seven percent (7%) whole body functional impairment as a result of her back problems but he declines to provide an opinion regarding job task loss.

The respondent presented the testimony of William D. Smith, M.D., the board-certified orthopedic surgeon that respondent chose to treat claimant in late 1993. Dr. Smith first saw claimant in November of 1993 with complaints of low back and tailbone pain that she attributed to sitting on a stool while working for the respondent. During the physical examination claimant exhibited exquisite tenderness in the area of her sacrum and coccyx. The examination also revealed that the coccyx segment was anteverted, or flexed forward, which x-rays likewise confirmed. The doctor diagnosed chronic coccygodynia which he explained was inflammation and pain in the area of the tailbone. Although the condition may sometimes be congenital, the doctor indicated it can also be caused by a fall or repeated traumas such as that caused by sitting on a small object such as a stool, motorcycle seat or saddle. Based upon his experience and his review of this matter, Dr.

Smith believes claimant's condition was caused and permanently aggravated by her work activities. After attempting to treat claimant with relief pillows and injections, in January 1994 the doctor performed a coccygectomy.

According to his interpretation of the AMA Guides, Dr. Smith believes claimant has sustained a five percent (5%) whole body functional impairment as a result of her injury and believes she should observe the following work restrictions and limitations: no sitting or standing for greater than one hour at a time and no kneeling, bending, stooping or squatting. The doctor believes claimant can lift up to ten (10) pounds repetitively and up to twenty (20) pounds occasionally. The doctor released claimant to return to work with her restrictions as of April 1, 1994. At the time of his deposition, Dr. Smith had not reviewed the job description for the sewing job claimant attempted to perform in May 1994 and, therefore, did not have an opinion whether claimant could perform that job. However, the doctor indicated claimant should not perform work where she has to lean forward on a repeated basis during the day.

Based upon the above evidence, the Administrative Law Judge found that claimant had proved that she sustained personal injury by accident arising out of and in the course of her employment with the respondent. The Administrative Law Judge used claimant's last day of regular work, August 11, 1993, as the date of accident. The Appeals Board agrees with that analysis and conclusion. The greater weight of the evidence indicates claimant injured her coccyx while working for the respondent when she was sitting and repairing boats. Based upon the testimony of both Drs. Moorhead and Smith, the Appeals Board also finds that claimant sustained a repetitive-type injury that continued through claimant's last day of regular duty employment and, therefore, August 11, 1993 is the most logical and correct date of accident to be used for purposes of this Award. See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), and Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

(2) The Administrative Law Judge found claimant had sustained a seventy-four percent (74%) work disability. That finding should be modified.

For accidents occurring on and after July 1, 1993, permanent partial general disability is governed by the latest version of K.S.A. 44-510e(a) which provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

In her efforts to establish task loss, claimant presented the testimony of both her labor market expert, Jerry Hardin, and one of her physicians, Dr. Moorhead. From claimant's list of the major physical tasks she had performed in jobs she held over the last fifteen (15) years, Mr. Hardin prepared a job task analysis wherein he indicated what job

tasks claimant could perform utilizing Dr. Smith's opinions of claimant's restrictions and abilities. Dr. Moorhead used information from that job task analysis in determining the specific tasks claimant could no longer perform. Beginning at page 107 of his deposition, Dr. Moorhead testified claimant was unable to perform three tasks out of a total of nine that Jerry Hardin identified comprised claimant's job at respondent's plant. Dr. Moorhead stated claimant presently could repair fiberglass using a grinder, repair fiberglass using a paint gun, detail fiberglass, handle customer service duties, and move lightweight materials. He believes claimant could not repair fiberglass using a buffer, perform clean up chores, or move paints. Because he did not testify that claimant could not repair fiberglass using an orbital sander and because claimant bears the burden of proof, we must assume she retains that ability.

Regarding the job claimant held with a nursing home facility, Dr. Moorhead testified claimant was unable to perform six tasks out of a total of twenty-two (22). The doctor believes claimant presently retains the ability to plan activities for the residents, coordinate outings for the residents, work with special need patients, chart, type, answer the telephone and perform bookkeeping, introduce new clients to the home and procure background histories. However, he believes claimant cannot wash and dry linens, move patients, mop floors, buff floors, clean resident's rooms, or perform general housekeeping duties. Again, the doctor did not provide an opinion whether claimant could perform seven of the twenty-two (22) tasks identified by Mr. Hardin and we, therefore, must assume that claimant retains the ability to perform them. Additionally, those seven tasks appear very similar to the activities the doctor indicated claimant could perform.

Regarding claimant's former job as an optometric assistant, Dr. Moorhead testified claimant was unable to perform two tasks out of a total of eleven (11). The doctor believes claimant presently retains the ability to size eyeglasses, train patients in proper care, pick up mail, transfer eyeglass prescriptions from charts and order supplies. He believes claimant presently could not clean the examination rooms or vacuum the office. The doctor did not provide an opinion whether claimant could perform four tasks out of the eleven (11) and we, therefore, assume that she could. Also, those four tasks are in the nature of customer service and would appear to be activities that claimant could perform.

Respondent presented the testimony of vocational rehabilitation counsellor, Karen Crist Terrill. Ms. Terrill testified that according to her analysis, which included weighing the tasks according to the amount of time spent in performing those tasks over the last fifteen (15) years, claimant has lost approximately twenty-five and one tenth percent (25.1%) of her ability to perform those tasks utilizing Dr. Smith's restrictions and the respondent's description of the job tasks claimant performed for that company. However, utilizing the same restrictions and claimant's description of her job tasks while working for the respondent, Ms. Terrill testified that claimant's task loss would be approximately sixty-nine percent (69%).

Based upon Dr. Moorhead's testimony, the Appeals Board finds claimant is unable to perform eleven (11) out of forty-two (42) work tasks that she performed in jobs she held over the fifteen (15) year period before her work-related injury. Therefore, under K.S.A. 44-510e, the Appeals Board finds claimant has sustained a twenty-six percent (26%) loss of work tasks. The Appeals Board finds Dr. Moorhead's task loss analysis persuasive because as one of respondent's company physicians, he has personally observed various job tasks being performed in the plant and is familiar with claimant's former job duties. Also, as one of claimant's treating physicians he is acutely aware of claimant's limitations and abilities.

The Appeals Board is aware that Dr. Moorhead testified that he believes claimant has a seventy-five percent (75%) reduction in the work tasks she performed for the respondent, a forty percent (40%) loss of the work tasks she performed for the nursing home, and a thirty percent (30%) loss of the work tasks she performed as an optometric assistant. However, that testimony was a general adoption of the report prepared by Jerry Hardin and not as specific as that recited above and utilized by the Appeals Board.

The Appeals Board finds claimant has a one hundred percent (100%) loss or difference between the wages she was earning at the time of her injury and the amount she is presently earning. As indicated above, claimant was physically unable to perform the job respondent offered and she was neither working nor earning any wages at the time of her regular hearing. No evidence has been presented that claimant is attempting to manipulate her workers compensation award or is engaged in any other activity which would operate to reduce the wage loss prong of K.S.A. 44-510e.

As required by K.S.A. 44-510e, the Appeals Board averages the twenty-six percent (26%) loss of ability to perform former tasks with the one hundred percent (100%) difference in wages and finds that claimant has a sixty-three percent (63%) permanent partial general disability for which she is entitled benefits.

Respondent contends the Administrative Law Judge erred by considering Dr. Moorhead's opinion regarding the loss of ability to perform work tasks. Respondent argues that under K.S.A. 44-510e(a) only the treating physician may establish the percentage of task loss. As indicated by the Administrative Law Judge, that statute is not to be interpreted in that manner and the trier of fact has the discretion to consider all physician's opinions on task loss in determining work disability. Also, Dr. Moorhead was a treating physician.

The respondent also argues that claimant should be limited to an award based upon her functional impairment only. Respondent contends that it provided claimant with a job paying comparable wage when she returned to work in May 1994 and, therefore, claimant is not entitled to an award based upon work disability. The Appeals Board disagrees. The Appeals Board finds the sewing position was outside claimant's work restrictions and limitations and that she was unable to physically perform it even for a short period of time.

(4) The Appeals Board finds the Award should be modified to award claimant temporary total disability benefits for the period of August 11, 1993, when she was taken off work by Dr. Moorhead, through April 1, 1994, the date she was released to return to work by Dr. Smith.

(5) The Appeals Board finds the Award should also be modified to delete all language requiring the claimant to contact the Administrative Law Judge and her attorney within two weeks if she finds employment or begins earning wages. Although the language may be desirable, the Appeals Board is unaware of any provision of the Workers Compensation Act that empowers the Administrative Law Judge to issue such directive and none has been cited by the respondent.

(6) The Appeals Board adopts the findings and conclusions of the Administrative Law Judge to the extent they are not inconsistent with those specifically made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated November 8, 1994, should be, and hereby is, modified as follows: that claimant is entitled to temporary total disability benefits for the period of August 11, 1993 through April 1, 1994, a period of 33.43 weeks; that all language requiring the claimant to contact the Administrative Law Judge and her attorney within two weeks if she finds employment or begins earning wages is deleted; and that claimant is entitled to permanent partial disability benefits based upon a 63% work disability.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debbie Olive, and against the respondent, Fiberglass Engineering, Inc., and its insurance carrier, U.S.F. & G., for an accidental injury which occurred August 11, 1993, and based upon an average weekly wage of $472.84, for 33.43 weeks of temporary total disability compensation at the rate of $313.00 per week or $10,463.59, followed by 249.84 weeks at the rate of $313.00 per week or $78,199.92 for a 63% permanent partial general disability making a total award of $88,663.51.

As of February 9, 1996, there is due and owing claimant 33.43 weeks of temporary total disability compensation at the rate of $313.00 per week or $10,463.59, and followed by 97 weeks of permanent partial disability compensation at the rate of $313.00 per week or $30,361.00, for a total due and owing of $40,824.59 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $47,838.92 is ordered paid at the rate of $313.00 per week for 152.84 weeks until fully paid or further order of the Director.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid directly as follows:

Barbara J. Terrell & Associates	
Deposition of James Casper	Unknown
Deposition of Francis Aeschliman	$143.50
Deposition of Jerry D. Hardin, M.S.	$159.50
Deposition of Frank Allen Moorhead, Jr. M.D.	Unknown
Bartlesville Reporting Service	
Deposition of William D. Smith, M.D.	$214.59
Deposition Services	
Transcript of Regular Hearing	$650.50
Court Reporting Service	
Deposition of Diane J. Joseph	$221.05
Deposition of Karen Crist Terrill	$356.70

Claimant is awarded unauthorized medical benefits up to the statutory maximum of $500.00 upon proof of payment and future medical benefits upon proper application and approval by the Director.

The remaining orders set forth in the Award are hereby adopted to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the opinion of the majority with regard to issue number five. The majority deletes from the Award the Administrative Law Judge's language requiring claimant to notify the Court and her attorney should she find employment. We do not consider such a requirement to be inappropriate under the facts of this case. Neither would we find this provision to exceed an administrative law judge's jurisdiction. We consider such an order to be within the investigatory authority conferred upon administrative law judges by K.S.A. 44-551(b)(1).

The majority's award is based, in part, upon a one hundred percent (100%) wage loss. However, the claimant's testimony indicates that she has not actively sought employment since quitting her job with the respondent and has, in effect, temporarily removed herself from the labor market. Under such circumstances, a work disability based upon a one hundred percent (100%) wage loss may not be appropriate, absent the Administrative Law Judge's admonition that claimant report any future earnings.

This case affords a good example of a fact situation where some ongoing method of ascertaining claimant's employment status and earnings is needed. There is no question but that claimant is capable of engaging in substantial gainful employment, yet she is receiving compensation pursuant to an Award based upon a one hundred percent (100%) wage loss because the record shows she was unemployed at the time this case was submitted for a decision. The record further shows her to have been in the process of moving out of the state of Kansas. This would make it all the more difficult for the respondent to keep abreast of her work status. Under these circumstances the logic behind the Administrative Law Judge's order becomes all the more compelling. The employer need not be left to its own devices to somehow keep track of claimant's earnings. When the legislature drafted a statute which tied the determination of work disability in K.S.A. 44-510e(a) to “the average weekly wage the worker is earning after the injury,” it must have envisioned a procedure for monitoring such earnings.

We do not consider the requirement for claimant to report her employment status and earnings to be an unreasonable burden upon the claimant. During the time claimant is collecting work disability benefits, the Administrative Law Judge would be within her authority to order that claimant notify Court and counsel within a reasonable time of her finding employment.

BOARD MEMBER

BOARD MEMBER

c: Charles W. Hess, Wichita, Kansas
M. Doug Bell, Coffeyville, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director